STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-02018

vs.

Referee Decision No. 0024272623-03U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision wherein the claimant was held disqualified from receipt of benefits and the employer's account was noncharged.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

The issue before the Commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant provided domestic services at the home of a chiropractor and dermatologist, beginning on July 20, 2011. She worked twenty hours a week and earned $300 a week at the time of separation. The chiropractor's mother told her son that the claimant said she was no longer cleaning her son's home in the manner she once had and the claimant stated that she had "given up." The claimant was terminated on October 17, 2014, for poor job performance.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee's decision is not supported by competent, substantial evidence, and, further, is not in accord with the law; accordingly, it is reversed.

Section 443.036(29), Florida Statutes, states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

> (a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; or theft of employer property or property of a customer or invitee of the employer.
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.
>
> (c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.
>
> (d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.
>
> (e) 1. A violation of an employer's rule, unless the claimant can demonstrate that:
>
> a. He or she did not know, and could not reasonably know, of the rule's requirements;
>
> b. The rule is not lawful or not reasonably related to the job environment and performance; or
>
> c. The rule is not fairly or consistently enforced.

> 2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

When a claimant's separation results from an employer's decision to discharge the worker, the burden of proving misconduct rests with the employer. *See Lewis v. Unemployment Appeals Commission*, 498 So. 2d 608 (Fla. 5th DCA 1986). In this case, the employer's witness testified he discharged the claimant because *his mother informed him that the claimant admitted to her that she had "given up" with respect to maintaining her duties to the employer*. The claimant, however, provided firsthand testimony that she never told the mother that she had "given up" regarding her job responsibilities. The employer's decision to discharge the claimant, therefore, was based purely on hearsay information. Although the employer's witness believed the information reported by his mother, the allegation is not supported by competent evidence and cannot be used for the purpose of *establishing* a fact. Section 443.151(4)(b)5.c., Florida Statutes, provides that hearsay evidence may be used for the purpose of *supplementing* or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Because the statement the mother made to the employer's witness does not fall within a hearsay exception, the statement can only be considered corroborative hearsay, used to corroborate, supplement or explain other evidence. As discussed below, because the record does not reflect competent, substantial evidence of poor performance, there is nothing for this corroborative hearsay to corroborate in this case. Accepting this evidence as probative would effectively nullify our requirement that some competent evidence be admitted prior to consideration of corroborative hearsay. It would also run afoul of the rule that "inadmissible" hearsay evidence may not be the only basis for a material finding denying benefits. *Tassone v. Unemployment Appeals Commission*, 662 So. 2d 1003, 1004-05 (Fla. 1st DCA 1995).

The referee's finding that states the employer discharged the claimant for poor job performance is corrected to reflect the discharge occurred as a result of an allegation of poor performance. The record reflects the employer's witness was concerned about the decline in the claimant's job performance based on his personal observations; however, he failed to provide sufficient, competent evidence regarding any *details* substantiating the allegation of a decline in performance sufficient to prove such poor performance. The son's testimony reflects that he was merely going

to speak with the claimant regarding his concerns about her performance, prior to learning of the alleged admission. The termination letter included with the hearing documents did not provide any information indicating dissatisfaction with the claimant's service. Furthermore, the record reflects the claimant had not previously been made aware of any concerns regarding her work or performance.

Moreover, other than the alleged admission to the mother, the record lacks any competent evidence that the claimant intentionally failed to provide service up to the standards expected of the employer or refused to apply herself, when able. *Rycraft v. United Technologies*, 449 So. 2d 382 (Fla. 4th DCA 1984). Because such evidence is an essential requirement of misconduct in a poor performance case, it cannot be demonstrated solely by corroborative hearsay.

We conclude, therefore, that the record does not support a finding of misconduct; accordingly, the decision is reversed.

The portion of the referee's decision stating the claimant had good cause for an additional hearing is affirmed. That portion of the decision stating the claimant was discharged for misconduct connected with work, however, is reversed. If otherwise eligible, the claimant is entitled to benefits. The employer's record shall be charged with its proportionate share of benefits paid in connection with this claim.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on
7/15/2015 ,
the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.
By: Kimberley Pena
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*41303189 *

Docket No.0024 2726 23-03 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee ***EMPLOYER/Appellant***

APPEARANCES Claimant

Employer

DECISION OF APPEALS REFEREE

Important appeal rights are explained at the end of this decision.

Derechos de apelación importantes son explicados al final de esta decisión.

Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rules 73B-20.016; 20.017.

SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11), (13); 443.036(29), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

Issues Involved: CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026; 11.018, Florida Administrative Code. (If charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Case History: A determination was rendered on December 15, 2014, adverse to the employer who subsequently appealed it. A hearing was scheduled on January 29, 2015. The employer alone appeared at the hearing and a decision was rendered in favor of the employer. The claimant requested the case be reopened on February 13, 2015. The claimant requested corresponded regarding her claim be sent to her electronically. The claimant did not receive an email message that a hearing would take place on January 29, 2015.

A case will be re-opened for a hearing on the merits when a party requests a reopening within 20 days of rendition of the decision and establishes good cause for not attending a previous hearing. If good cause is not established, the previous decision will be reinstated. Good cause includes a compelling reason for failure to attend the previous hearing and exercising due diligence to have the hearing rescheduled. Examples of due diligence include making a request for postponement before the hearing or notifying the Appeals Office as soon as possible after the hearing if an unexpected situation prevented the party from attending.

As the claimant did not receive notification that the hearing would take place and did not check her inbox the claimant has shown good cause for nonappearance. The case is reopened.

Findings of Fact: The claimant provided domestic services at the home of a chiropractor and dermatologist, beginning on July 20, 2011. She worked twenty hours a week and earned $300 a week at the time of separation. The chiropractor's mother told her son that the claimant said she was no longer cleaning her son's home in the manner she once had and the claimant stated that she had "given up." The claimant was terminated on October 17, 2014, for poor job performance.

Conclusions of Law: The Reemployment Assistance Law of Florida defines "misconduct" irrespective of whether the misconduct occurs at the workplace or during working hours, includes but is not limited to, the following, which may not be construed in pari materia with each other:

a. Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; theft of employer property or property of a customer or invitee of the employer.

b. Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

c. Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

d. A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

e. 1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b. The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record reflects the claimant was discharged for insubordination. The burden of proving misconduct is on the employer, Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). The record reflects that the claimant's employers had noticed a decline in the claimant's performance but had not addressed the matter with the claimant. The record further shows that the claimant was terminated based on a conversation between the employer and his mother regarding an admission to the mother.

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding s. 120.57(1)(c), hearsay evidence may support a finding of fact if:

1. The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and

2. The appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

In the instant case an admission by an employee to the mother of the employer that the worker no longer cared about the job is sufficient to show misconduct. Consideration was given as to whether the claimant should have been given verbal or written warnings for her decline in performance before the termination occurred. Both the husband and wife observed the decline in performance and the mother's conversation with the claimant solidified the concern. By admitting that she no longer cared, the claimant demonstrated a conscious disregard of the employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer had a to expect for an employee. The claimant was negligent in her domestic duties and the continued failure to clean as she previously had manifests culpability, wrongful intent, and shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer. The records supports a finding of misconduct under subparagraphs (a) and (b). The claimant is not disqualified from receipt of benefits.

The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes

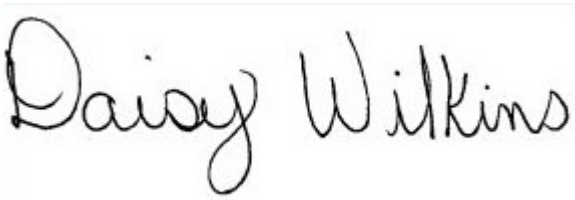
required notice to the Department when the claimant was discharged for misconduct connected with the work. Since the claimant was terminated for misconduct connected with the job the employer's account will be relieved of chargeability.

Decision: The determination dated December 15, 2014, is REVERSED. The claimant is disqualified for receipt of benefits from October 12, 2014, the immediate five weeks thereafter, and until she earns $4,675. The employer's account is relieved of chargeability.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was distributed/mailed to the last known address of each interested party on April 24, 2015.

M. MURDOCK
Appeals Referee



By:

DAISY L. WILKINS, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the distribution/mailed date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la distribución/fecha de envìo marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante rembolsar esos beneficios. La cantidad específica de cualquier sobrepago [pago excesivo de beneficios] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

Una parte que no asistió a la audiencia por una buena causa puede solicitar una reapertura, incluyendo la razón por no haber comparecido en la audiencia, en connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

ENPÒTAN - DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat distribisyon/postaj. Si 20yèm jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, connect.myflorida.com oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat cofimasyon page sa pral jou ou ranpli deman pou reouvewti dan web sit depatman.

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); https://raaciap.floridajobs.org. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak nimewo sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.
